

IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT
JODHPUR.

JUDGMENT.

The State of Rajasthan M/s Shekawat Construction
through Collector Bikaner Vs. Company & anr.
& anr.

S.B. Civil Misc. Appeal No.1184/2005 under
Section 39 of the Arbitration and Conciliation Act read
with Order 43 Rule 1, C.P.C. Against the order dated
1.3.2005 passed by the learned District Judge, Bikaner
in Civil Misc(Arbitration) No.06/2004-M/s Shekhawat
Construction Company vs. State of Rajasthan.

Date of Judgment: October 18, 2005.

PRESENT
HON'BLE MR. PRAKASH TATIA,J.

Mr. H.R. Soni, Addl. GA for the appellant.
Ms. Rekha Borana, for the respondent.

BY THE COURT:

This appeal is against the order of the Civil Court, court of
learned District Judge, Bikaner dated 1.3.2003 by which the learned
court below rejected the objection filed by the appellant-State against
award dated 15.11.2003 and made the award rule of the court.

The brief facts of the case are that a work contract No.5/92 was
awarded by the appellant-State. to the contractor. Under the contract,
the contractor was to commence the work from 29.7.1992 and was to

complete the work by 28.7.1993. The total work had many stages including transportation of material to site, site preparation, digging of pits, raw manufacturing of bricks, brick burning etc. According to contractor, he started work and it transported 639 mt. tones coal to site, lifted 1,280 mt.tones heavy sand and transported it to site and mixed the sand and work of preparation of raw *Int* was in progress. All it was done by the end of February,1993. According to the contractor, thereafter, the Commissioner, CAD, IGNP, Bikaner called a meeting of the officers and took a decision that since there is a less requirement of the bricks, therefore, the contractor may be informed by using language carefully so that they may stop manufacturing of the bricks. The claimant, therefore, raised a dispute and requested for appointing arbitrator, upon which the arbitrator was appointed by the department of the appellants. The learned arbitrator passed the award on 14.4.1994 in favour of the contractor. Said award was challenged by filing objection before the civil court by the State. The objections were accepted by the civil court by order dated 13.2.1997 and the matter was remanded back to the learned arbitrator but in appeal against the order dated 13.2.1997, the High Court set side the order of the trial court dated 13.2.1997 by order dated 1.2.2002 and made the award rule of the court. Against this, Special Leave to Appeal was preferred and ultimately the Special Leave to Appeal was allowed by the Hon'ble

Supreme Court vide order dated 7.10.2002 and the order of the High Court dated 1.2.2002 was set aside and the order of the learned District Judge dated 13.2.1997 was restored. Hon'ble the Apex Court observed that the learned Arbitrator should pass a reasoned order . Therefore, now there is no dispute in the present case and the learned arbitrator was supposed to pass a reasoned order in pursuance of the order of the Hon'ble Apex Court. After the order of the Hon'ble Apex Court, the learned arbitrator gave opportunity to both the parties to produce evidence and both the parties produced evidence before the arbitrator. Both the parties also submitted written arguments before the learned arbitrator and thereafter the learned arbitrator passed the award on 15.11.2003 holding the respondent-contractor entitled for total Rs.4,52,100.37 with interest from 18.11.1993 to 22.8.1994 @ 18% amounting to Rs.61908.50. When the award was sought to be made the rule of the court, objection under Section 30 were submitted by the appellant before the court of learned District Judge, Bikaner. The civil court after considering the objection of the appellant, dismissed the objection-petition vide order dated 1.3.2005. Hence this appeal.

According to the learned counsel for the appellants, the learned arbitrator committed grave error of law and has not passed the reasoned order despite the fact that the award runs in 60 pages.

According to the learned counsel for the appellants, the learned arbitrator in the award only incorporated the pleas taken by the parties in their claim and replies and also quoted the contents of the documents referred by the parties. The learned counsel for the appellants also submitted that the award contains the error apparent on the face of the record. According to the learned counsel for the appellants, for the contract which was awarded to the contractor in the year 1992, the contractor was supposed to start the work from 29.7.1992 and should have completed the work by 28.7.1993, has not supplied even single brick to the department despite the fact that by 28.7.1993, the contractor was supposed to supply 25 lacs bricks to the department. This aspect was not even considered by the learned arbitrator. It is also submitted that the learned arbitrator even did not decide the crucial issue about fixing the responsibility for breach of contract and according to the appellant, the contract was breached by the respondent-contractor and that fact is apparent from all the material placed before the learned arbitrator, rather it is an admitted case of the breach of the contract by the contractor in view of the fact that the contractor did not supply a single brick to the appellant-State despite the fact that in view of sub-clause (b) of clause 15 of the terms and conditions of the contract, the arbitrator was under obligation to ensure good progress during the execution of the work and in this case,

since the time allowed for the work was beyond the period of one month, therefore, the contractor was required to complete the $\frac{1}{8}$ th of whole of the work before $\frac{1}{4}$ th of the whole time allowed under the contract and $\frac{3}{8}$ th work before $\frac{1}{2}$ of such time elapsed. According to the learned counsel for the appellant in view of the terms used in the agreement, it is clear that the time was the essence of the contract and the respondent failed to supply the bricks to the appellant, not only within time but he failed to give good progress during the execution of the work. These aspects were not considered by the learned arbitrator.

It is also submitted by the learned counsel for the appellants that the arbitrator influenced by the department letter dated 2.3.1993 proceeded to decide that whether after 2.3.1993, the appellant prevented the respondent-contractor from supplying the goods under the contract whereas the learned arbitrator did not consider the facts about work prior to 2.3.1993 despite the fact that before 2.3.1993, the respondent already committed the breach of the contract.

The learned counsel for the appellants further submitted that in view of the terms and conditions of the contract, as provided in clause 3 (k), the Engineer In-charge had full power to decrease or increase the quantity of supply and in case the quantity is increased, the time period

can be extended under clause (3) of the contract. This aspect was also not considered by the learned arbitrator.

The learned counsel for the respondent vehemently submitted that the appellants have not raised any ground like award being without reasons at any stage. Even such ground was not raised before the court below nor it has been raised in the memo of appeal. It is also submitted that the appellant even never alleged that the respondent-contractor committed breach of contract. It is also submitted that not only this but in fact even after the letter dated 2.3.1993, the appellant did not initiate any proceeding to terminate the contract of the respondent-contractor and neither they forfeited the earnest money nor they imposed any penalty which they could have imposed under the terms of the contract if it was a case of breach of contract by the respondent-contractor. Not only this but by the letter dated 2.3.1993, the respondent-contractor was asked not to do the work. From other letters, it is clear that the authorities incharge were directed by the higher authority not to make any payment to the contractor under the contract in question so that contractor himself may not supply the bricks because in the opinion of higher authorities, at the relevant time there was less requirement of bricks. The said letter, directing the respondent to stop the work, was never withdrawn by the respondent

and the time expired during the currency of the order issued by letter dated 2.3.1993.

The learned counsel for the respondent further vehemently submitted that the learned arbitrator decided each and every issue after considering each and every fact which is clear from the award itself. The learned counsel for the respondents pointed out that the learned arbitrator considered the question of periodical progress of the work and also held that as per the condition no.6 of the contract, the appellants themselves supplied the coal after delay of seven months. The learned arbitrator not only held that the trench for furnace was digged and constructed by the contractor and he was ready with more than 11 lacs bricks but they were not burnt because of the reason that before that process of burning of the bricks, the contractor was served with the letter dated 2.3.1993. In view of the above all facts also, the contention of the appellant is wrong that the learned arbitrator has not passed a reasoned award.

I considered the submissions of the learned counsel for the parties and perused the record also.

It is clear from the facts of the case that the work contract was

given to the contractor in the year 1992 with a condition that the work shall be commenced from 29.7.1992 and it will be completed by 28.7.1993. The sub-clause (b) of clause 15 of the terms and conditions of the contract provides that time shall be the essence of the contract and it also provides that periodical progress of the work is to be maintained by the contractor. Under the contract, the contractor was required to collect the raw material, obtain the certain facilities from the appellants and, thereafter, manufacture the bricks and in last to supply the bricks to the appellant. Because of this peculiar type of the work, the appellants allowed the payment of the bills as per the work done by the contractor without getting a single brick against supply of total 25,00,000/- bricks. It is not in dispute that the total contract amount was Rs.15.5 lacs only, out of which the contractor was paid Rs.4,52,618/- against the two running bills which are of the date 4.1.1993 and 16.2.1993. Till that date, there was no dispute or allegation of breach of the contract by the contractor. The dispute was not raised by the appellants and the matter was referred to the arbitrator not because the respondent-contractor breached the contract. The respondent-contractor's case was that by the communication dated 2.3.1993 he was directed to stop the work and a decision was taken to stop further payment to the respondent-contractor. Not only this but as per the letter of the Chief Engineer

dated 9.3.1993, quoted in the award, it appears that the department had serious objection against the transportation of clay and coal after 26.2.2003 because before that it has already been decided that no further payment of carriage of coal and clay should be made to the kiln contractors before obtaining approval of the Chief Engineer, C.A.D., IGNP, Bikaner. Not only this but the Chief Engineer issued an order on 6.4.1993 conveying in the course of review meeting held in the month of February, 1993, at different levels, it was observed that there may be cases where procurement as planned might exceed actual requirement for works and, therefore, the Chief Engineer directed all the Superintending Engineers and Executive Engineers vide letter dated 10.3.1993 to stop further procurement till the entire position was reviewed. This aspect was considered by the learned arbitrator, therefore, the arbitrator did not find any fault of contractor who had manufactured good quality of bricks to the stage of making them hard by burning.

Not only all above letters but all documents which were placed by the parties were considered by the learned arbitrator and thereafter, the learned arbitrator decided the dispute between the parties by framing as many as seven issues. The learned arbitrator also framed the

issue no.2 whether the contractor could not complete the work because of the letter of the appellant dated 2.3.1993 and because of the reasons created by the department which substantially covers the dispute whether it was the breach committed by the contractor or it was department who is responsible for stoppage of the work. The learned arbitrator even incorporated the relevant portion of the evidence of the witnessed produced by the appellant. The appellant's witness R.W.2- Shri M.C. Goyal, Assistant Engineer admitted that by the time of 2.3.1993, the contractor transported 639 Metric tons of the coal and 702 Cubic Meters clay and payment of the said work was paid to the contractor and, thereafter, order dated 2.3.1993 was given to the contractor. He admitted that by 26.3.1993, the contractor prepared about 12-13 lacs bricks but they were not burnt. The witness M.C. Goyal as well as Jr. Engineer Rampal (R.W./3) both admitted that the work was going on under the contract and the contractor was paid against the running bills and the witness Rampal even admitted that the contractor dig the trench and also done some masonry work but thereafter he stopped the work.

In view of the above, it cannot be said that the learned arbitrator did not consider any of the evidence produced by the parties. After considering the evidence, the learned arbitrator gave finding on all

issues and for that purpose gave reasons. Therefore, it cannot be said by any stretch of imagination that the learned arbitrator has passed the impugned award without assigning any reason. From the bare perusal of award, it is clear that the learned arbitrator relied upon the various documents of the appellants-department and statements of the witnesses produced by the appellants themselves and the finding of fact recorded by the learned arbitrator is based on evidence. It appears that the appellants are under impression that the periodical progress as required by sub-clause (b) of clause 15 of the contract means the actual supply of the bricks, that is, supply of 1/8th quantity of the bricks within 1/4th time of the contract time allowed under the contract ignoring the fact that this is not a contract of supply of goods only. The word in sub-clause (b) of clause 15 has been used "1/8th of the whole of the work". Therefore, the procurement of the raw material and process for manufacturing the bricks also is included in the "whole of the work" which should have been done by the contractor. In view of the above also, I do not find any substance in the submission of the learned counsel for the appellants.

Hence there is no merit in the appeal which is hereby dismissed.

(PRAKASH TATIA),J.

mlt.

